

## FAILURE TO REQUIRE CRIMINAL INTENT OR TO DEFINE COST IN REGULATORY STATUTE DENIES DUE PROCESS

*State of Kansas v. Fleming Company, Inc.*  
339 P.2d 12 (1959)

The state of Kansas brought suit to enjoin six defendants from violating a Kansas statute which made it unlawful for any wholesaler, processor, or distributor of dairy products to "sell any products . . . for less than cost . . . at the point of delivery; . . . except a person may sell either such dairy products or expendable supplies at prices made in good faith to meet existing lawful competition. . . ."<sup>1</sup> The Supreme Court of Kansas affirmed a judgment in the District Court holding that the statute denied due process of law to persons affected thereby.<sup>2</sup>

The police powers of a state have consistently been held to include the power to establish regulations in the dairy industry so long as the regulations are reasonable and employ means reasonably related to a justifiable legislative purpose.<sup>3</sup> Thus it is clear that the state of Kansas did have the power under the federal constitution to make such regulations if they used reasonable means of achieving a legitimate legislative goal. In the *Fleming* case, however, the court concluded that since first, the statute did not require criminal intent as an element of the crime, and second, the terms "cost" and "existing lawful competition" were not defined, the requirements of due process under the fourteenth amendment were not satisfied.

In holding that criminal intent was required, the Kansas court relied heavily on a 1926 United States Supreme Court decision, *Fairmont Creamery Co. v. State of Minnesota*,<sup>4</sup> in which a statute forbidding creameries to purchase cream at higher prices in one locality than in another was held unconstitutional as denying due process of law since the statute prohibited purchases of cream at a higher price "irrespective of motive." The court also cited a 1912 case, *Central Lumber Co. v. State of South Dakota*,<sup>5</sup> in which the Court upheld a South Dakota statute which forbade discrimination in the price of goods in different localities "for the purpose of" destroying competition. Thus on the authority of these cases, the Kansas Supreme

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<sup>1</sup> [50] Kan. Gen. Stat. Ann. § 50-503 (Supp. 1957).

<sup>2</sup> Both state and federal constitutional due process clauses were violated by the Kansas statute.

<sup>3</sup> *Price v. People*, 238 U.S. 446 (1915); *Capital City Dairy Co. v. Ohio*, 183 U.S. 238 (1902); *Gundling v. Chicago*, 177 U.S. 183 (1900); *Plumley v. Massachusetts*, 155 U.S. 461 (1894); *Powell v. Pennsylvania*, 127 U.S. 678 (1887); *People v. Quality Provision Co.*, 367 Ill. 610, 12 N.E.2d 615, 114 A.L.R. 1210 (1938); *State v. Schlenker*, 112 Iowa 642, 84 N.W. 698 (1900); *Johnson v. Commissioner of Agriculture*, 314 Mich. 548 (1946); *State v. Crescent Creamery Co.*, 83 Minn. 284, 86 N.W. 107 (1901); *Commonwealth v. Jackson*, 345 Pa. 456 (1942).

<sup>4</sup> *Fairmont Creamery Co. v. State of Minnesota*, 274 U.S. 1 (1927).

<sup>5</sup> *Central Lumber Co. v. State of South Dakota*, 226 U.S. 157 (1912).

Court concluded that regulatory statutes must require criminal intent in order to satisfy due process requirements.

Upon a careful examination of the *Fairmont* and *Central Lumber* cases, one discovers that neither specifically held that criminal intent must be made an element of the crime in order to satisfy due process requirements. The Kansas court has simply implied this meaning from the words "for the purpose of" and "irrespective of motive" which the Supreme Court employed. That such an implication can or should be drawn is questionable. However, assuming this was the holding of these cases, it appears that criminal intent would not be required today. In a 1934 case, *Nebbia v. New York*,<sup>6</sup> the United States Supreme Court held that, "the guarantee of due process . . . demands *only* that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."<sup>7</sup> (Emphasis added.) Thus it would appear that by implication, the court has overruled the *Fairmont* and *Central Lumber* cases at least in part by saying that if the means selected are reasonably related to the goal of the legislation, due process requirements are satisfied. The statement in the *Fleming* case to the effect that "there is nothing to indicate that the *Nebbia* case overruled or made obsolete the *Fairmont* case"<sup>8</sup> appears to be in error since the *Nebbia* case was decided eight years after the *Fairmont* case and twenty-two years after the *Central Lumber* case and apparently excludes criminal intent as a requirement of the due process clause. Therefore it seems that the first ground relied upon by the Kansas court would not support the holding.

The second reason cited by the Kansas court was that the statute failed to define the terms "cost" and "existing lawful competition," and thus, due process requirements were not met. In 1921, the Supreme Court in *United States v. L. Cohen Grocery Co.*,<sup>9</sup> held that a section of the Federal Food Control Act<sup>10</sup> was unconstitutional as being too vague to satisfy due process standards.<sup>11</sup> The court concluded that, ". . . a statute creating an offense must use language which will convey to the average mind information as to the act or fact which it intended to make criminal."<sup>12</sup> Applying this test to the *Fleming* case, it appears that the failure to define "cost" meant that wholesalers, distributors and processors were left to determine what accounting methods were to be followed in finding their cost. Further, they were left at their peril to decide whether or not their competitors were legally selling above cost in order to determine whether they could lower their own

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<sup>6</sup> *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>7</sup> *Id.*, at 525.

<sup>8</sup> 339 P.2d at 17.

<sup>9</sup> *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

<sup>10</sup> 41 Stat. 297.

<sup>11</sup> The act made it "unlawful . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; . . ." and established fines or imprisonment, or both for violators. In the court's words, "the statute . . . was . . . so indefinite as not to enable it to be known what was forbidden . . ."

<sup>12</sup> *Supra* note 9, at 84.

prices to meet "existing lawful competition." Thus on the basis of the *Cohen Grocery* case, it is clear that the failure to define the terms "cost" and "existing lawful competition" in the Kansas milk statute resulted in an unconstitutional failure to afford some comprehensible guide, rule, or information as to what must be done or avoided, so that the ordinary man could know how to comply with its requirements.

In 1945, however, in *Screws v. United States*,<sup>13</sup> the Supreme Court upheld a criminal statute which imposed certain sanctions on those who "willfully" violated its provisions.<sup>14</sup> While the acts prohibited were somewhat vague, the court concluded that "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."<sup>15</sup> Thus if the act prohibited is understood by a given actor, and he willfully violates the law, the resulting conviction would not be in violation of due process. This principle was also followed by the Supreme Court in *United States v. Ragen*.<sup>16</sup> Therefore, on the basis of the *Nebbia* and *Screws* cases, it appears that while criminal intent need not be an element of a statutory crime in order to satisfy due process requirements so long as the acts prohibited are clearly defined, its presence may result in a somewhat vague statute's being upheld.

In relating the foregoing discussion to the *Fleming* case, one concludes that if the statute had either adequately defined "cost" and "existing lawful competition" so that the acts prohibited were clear, or had included a requirement of specific intent to violate the act as an element of the crime, it would not be subject to due process attack on the ground of lack of notice. But, in seeking to regulate the milk industry, what means could best satisfy this purpose? In defining such terms as "cost" and "existing lawful competition," many problems arise due to the complexity and great variety of factors involved in the dairy industry. The legislature would probably be forced to simply require that recognized accounting procedures be employed in determining cost. Any definition of "existing lawful competition" would probably be even less adequate. To simply add a requirement of specific intent might satisfy due process requirements on the basis of the *Screws* case but would not adequately serve the legislative purpose since the necessity of proving willfulness would greatly hamper the regulatory effect of the statute. Perhaps the best means of achieving the desired regulation in this complex industry would be to establish an administrative agency. Such an agency would have the advantage of employing specialists in the dairy field who were qualified to establish the most desirable regulatory policies

<sup>13</sup> *Screws v. United States*, 325 U.S. 91 (1945).

<sup>14</sup> 18 U.S.C. § 242 provides, "whoever, under color of any law . . . willfully subjects, . . . any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined . . . or imprisoned . . ."

<sup>15</sup> *Supra* note 13, at 102.

<sup>16</sup> *United States v. Ragen*, 314 U.S. 513 (1942).

and who were in the best position to study and select the most desirable methods of implementing these policies. Such a body could establish checks on wholesalers, processors, and distributors to insure that they knew of the pertinent regulations and complied with them. This specialized administrative agency could certainly handle the complex and ever changing problems involved in this industry much better than the legislature.

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